Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1997

JOHN J. WALKER, MADELINE E. WALKER, DAVID M. WALKER and RICHARD J. WALKER

Petitioners,

v.

FEDERAL HOME LOAN MORTGAGE CORPORATION

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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93 pp

QUESTIONS PRESENTED

I. Whether Petitioners, as purchasers of real property from Respondents, are precluded as a matter of law from maintaining claims against Respondents arising out of false financial statements provided by Respondents and other misrepresentations made by Respondents because the contracts signed by Petitioners contained a statement that Petitioners were not relying on any representations made by Respondents.

LIST OF PARTIES TO THE PROCEEDING

1. **Federal Home Loan Mortgage Corporation**
2. **John J. Walker**
3. **Madeline E. Walker**
4. **David M. Walker**
5. **Richard J. Walker**

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FEDERAL HOME LOAN MORTGAGE CORPORATION

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioners, John J. Walker, Madeline E. Walker, David M. Walker and Richard J. Walker, respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit filed December 17, 1997.

OPINIONS BELOW

The Court of Appeals simply affirmed the trial court. The affirmation as well as the denial of Petitioners' Motion for Rehearing are reproduced in the Appendix beginning at page A-1 through A-2. The Opinions of the District Court are not reported. They are reproduced in the Appendix beginning at page B- 1 and B - 41.

JURISDICTION

The Judgment of the Court of Appeals was filed on December 17, 1997. Since Freddie Mac is an agency of the United States, Federal Rule of Appellate Procedure 40 provides that a Motion for Rehearing is timely filed if filed within 45 days of the date of the Judgment of the Court of Appeals. Petitioners timely filed a Motion for Rehearing pursuant to Rule 40. The Motion for Rehearing was denied by order of the Court of Appeals filed February 19, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

STATUTORY PROVISIONS

None of relevance to this petition.

STATEMENT OF THE CASE

Respondent Federal Home Loan Mortgage Corporation, an agency of the United States (**"Freddie Mac"**), sued Petitioners John and Madeline Walker for default on a Promissory Note (the **"Note"**) executed in connection with the purchase of the Northaven Apartments (**"Northaven"**), a multi-family apartment complex located in northwest Dallas, Texas. Freddie Mac sought to foreclose its lien on Northaven, collect any deficiency resulting from such foreclosure and recover its attorneys' fees. John and Madeline Walker counterclaimed.[1]

The bases for the counterclaims presented by Petitioners included the claim that Freddie Mac knowingly misrepresented the financial condition of the properties being purchased. For summary judgment purposes, it is not disputed that Petitioners presented evidence that Freddie Mac substantially misrepresented the financial condition of the Northaven property.

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[1] David and Richard Walker were subsequently added as parties by Freddie Mac. David and Richard Walker asserted the same counterclaims as John and Madeline Walker.

The basis for jurisdiction of the District Court was the presence of Freddie Mac, an agency of the United States, as a party.

After foreclosing on Northaven, Freddie Mac moved for summary judgment in its favor on all of the Counterclaims. Freddie Mac subsequently filed a second motion for summary judgment on its claims for breach of the Note and for collection of a deficiency judgment. Appellants opposed the summary judgment motions of Freddie Mac. The District Court granted both of Freddie Mac's Motions for Summary Judgment. The first summary judgment was filed on September 29, 1994. It was interlocutory. The second summary judgment was filed March 29, 1996 and was a final order in this case.

The District Court essentially held that even if Freddie Mac intentionally misrepresented the financial condition of the property being sold, its disclaimers negated any misrepresentations, intentional or otherwise. Specifically the District Court held in its Memorandum Opinion and Order filed September 29, 1994 that,

> "The evidence demonstrates that the Walkers are sophisticated investors and were on sufficient notice that Freddie Mac did not

> warrant the accuracy of any financial representations, oral or written. The numerous disclaimers made by Freddie Mac outweigh any oral affirmations made by Mssrs. Downey and Bulla. Therefore, the Court is of the opinion that Plaintiff's motion for summary judgment regarding Defendants' counterclaims for common law fraud and statutory real estate fraud should be granted."[2]

The specific evidence presented to the District Court during the summary judgment proceedings evidenced the following:

Freddie Mac acquired Northaven in a non-judicial foreclosure action in June 1989. In June of 1989 David Walker, on behalf of John and Madeline Walker, expressed an interest in purchasing Northaven. However, Freddie Mac decided to list Northaven for sale at an auction in December 1989 with a minimum required cash bid of $1.8 million. In connection with that auction, a Bid Package (**"Bid Package"**) regarding Northaven was prepared by JBS & Associates, the auctioneer. The Bid Package purported to provide the most complete and accurate financial information on Northaven available to Freddie Mac. Appellants

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[2] Appendix page B-27.

Richard and David Walker acquired a copy of the Bid Package in November 1989.

The auction was held on Thursday, December 12, 1989, however, Freddie Mac failed to sell Northaven as a part of the auction. After the auction, David Walker, asked Freddie Mac's Director of multi-Family operations, Southwest Region, Dennis Downey (**"Downey"**), if Freddie Mac would now consider selling Northaven to the Walkers with Freddie Mac financing a portion of the sales price. As a result of that inquiry a meeting was held on the same day in the Adolphus Hotel between Richard Walker, David Walker and Freddie Mac representatives.

David Walker and Richard Walker discussed the Bid Package with Freddie Mac's representatives at the meeting. The Bid Package represented that Northaven was generating a net operating income ("NOI") of approximately $14,830 per month after payment of taxes, insurance and a management fee. Richard Walker directly asked Freddie Mac's representatives, including Downey and Duane Bulla (**"Bulla"**), if the information contained in the Bid Package was accurate and correct. Downey and Bulla both expressly represented that

the information contained in the Bid Package was accurate. Neither limited his representation, made any disclaimers, or stated orally or in writing that Freddie Mac was relying upon information from third parties.

Downey and Bulla also expressly represented that Northaven was generating a net operating income (NOI) in excess of $15,000 per month after the payment of a management fee, property taxes and insurance. Bulla further represented that the present NOI of in excess of $15,000, plus the projected management fee of approximately $4,500 per month, would be sufficient to pay the mortgage on the proposed sales terms of $2.6 million.

These representations made by Freddie Mac at that meeting also involved information that was not included in the Bid Package including that Northaven's net operating income (NOI) had increased somewhat from $15,000 for the months of October and November, 1989; that the property was presently generating a $15,000 NOI after payment of taxes, insurance and a management fee; that the NOI was sufficient, along with the projected management fee, to allow the Walkers to

service the mortgage; and that based on this cash flow the property was worth $2.6 million. All the above oral representations were made expressly and unequivocally, and Freddie Mac made no disclaimer or limitation upon these oral representations. Neither Bulla nor Downey ever stated that Freddie Mac was merely passing along information provided by third parties without vouching for its accuracy or truthfulness.

Thereafter, on December 12, 1989, John and Madeline Walker, through David Walker, made a new written offer to purchase Northaven for $2.6 million (using a tax vehicle) with financing of $2,340,000 to be provided by Freddie Mac. Freddie Mac accepted this offer. The $2.6 million sales price, and the subsequent sales transaction, were all agreed to by the Walkers based upon Freddie Mac's representations that Northaven was generating approximately $15,000 per month in net operating income, after the payment of a management fee, taxes and insurance. But for these representations, John and Madeline Walker would not have purchased Northaven from Freddie Mac.

On January 17, 1990, Freddie Mac sold Northaven to Richard Curtin, who immediately

sold it to John and Madeline Walker in order to affect the "tax swap." Freddie Mac was paid $311,450.49 in cash at closing by the Walkers. The sales agreement also contained an addendum which acknowledged that John and Madeline Walker were the actual purchasers of the Property. Also on January 17, 1990, Freddie Mac made a loan in the principal amount of $2,340,000.00 to John and Madeline Walker for the purchase of Northaven. The loan is evidenced by the Note executed and is secured by a Multifamily Deed of Trust, Assignment of Rents and Security Agreement.

After acquiring Northaven, Appellants discovered that the condition of Northaven was not as represented by Freddie Mac. Specifically, the representations made by Freddie Mac were false in the following respects:

1. The information contained in the Bid Package was untrue and incomplete, and did not accurately reflect the amount of the operating expenses for Northaven, or the amount of the monthly net operating income (NOI) generated by Northaven. The Bid Package understates the property's operating expenses and overstates

Northaven's net operating income. The management company for Northaven had furnished this information to Freddie Mac, which knew that the information contained in the Bid Package was incomplete. In fact, at the time Freddie Mac prepared the bid package showing positive NOI, Freddie Mac had information that reflect Northaven was budgeted to have a NOI of negative $2,125 for the period in question.

2. The reports of the management company used by Freddie Mac for Northaven reflect that the September, 1989 gas bill was unpaid, and was estimated at $25,000. This was not disclosed in the Bid Package.

3. The Bid Package was reviewed and approved by at least Christie Montgomery, the Freddie Mac employee who received the Northaven operating reports from the management company, as well as Downey and Bulla.

4. Freddie Mac represented to Appellants that the net operating income (NOI) of Northaven for October, 1989 had increased from $15,000. The operating report prepared by the management company reflects a NOI for that month of a negative $28,160.

5. Freddie Mac represented to Appellants that the net operating income (NOI) of Northaven for November, 1989 had increased from $15,000. In fact, the operating report prepared by the management company reflected a NOI of a negative $5,500.

6. Freddie Mac misrepresented to Appellants that Northaven was presently generating a NOI of $15,000 per month, when in fact the NOI was much lower. The negative NOI projections described above were not disclosed to the Walkers prior to the purchase by the Walkers of the property.

7. Freddie Mac misrepresented to Appellants that the net operating income (NOI) generated by Northaven would be sufficient to service the debt.

8. Freddie Mac also failed to disclose to Appellants that Freddie Mac had secured an appraisal of Northaven dated May 10, 1989 prepared by Kenneth Phillips. In his appraisal, Mr. Phillips concludes that Northaven is losing money, and recommends that Freddie Mac consider demolishing the property.

As a result of the misrepresentations and the condition of Northaven, Appellants were unable to successfully run Northaven. On November 23, 1992, Freddie Mac commenced this litigation and obtained an ex parte appointment of a receiver for Northaven. On March 2, 1993, Freddie Mac foreclosed its lien against Northaven.

Decision of the Trial Court

The Trial Court's sole reason for dismissing all the fraud and some of the misrepresentation claims of Petitioners is as stated above, that is, the disclaimers negated the misrepresentations.

The trial court did not provide any authority to support its decision other than citations to general summary judgment standards. Those included the following, "A party defending against a motion for summary judgment cannot defeat the motion unless it provides specific facts that show the case presents a genuine issue of material fact, such that a jury might return a verdict in its favor, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256."[106 S.Ct. 2505, 91 L.Ed. 202 (1986)].[3]

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[3] Appendix page B-19 and B-20.

Decision of the Court of Appeals

On December 17, 1997 the Fifth Circuit Court of Appeals affirmed per curiam without opinion. Petitioners' Motion for Rehearing was denied per curiam without opinion on February 19, 1998.

REASONS FOR GRANTING THE WRIT

1. **The Fifth Circuit Court of Appeals Has Entered A Decision in Conflict with the Decision of Another United States Court of Appeals on an Important Matter.**

At issue is whether a contractual disclaimer of reliance defeats a claim for fraud as a matter of federal law. Encompassed in that question is whether a federal court applying state law with respect to the elements of a fraud claim should also apply state law with respect to the effect of "no reliance" clauses.

The Fifth Circuit has established a federal law standard that a buyer who signs a contract which includes a clause that the buyer is not relying on any representations by the seller is precluded from maintaining a fraud claim as a matter of law. The rationale is that any reliance on the misrepresentations is not reasonable,

and, if reasonable reliance is an element of the claim, the claim must fail. The standard appears to be independent of state law on that issue.

Other circuits have taken approaches that conflict with the Fifth Circuit approach. The Eighth Circuit approach is that the existence of a "no reliance" clause is a fact to be considered and it is not, of itself, conclusive. Commercial Property Investments, Inc. v. Quality Inns International, Inc., 938 F.2d 870, (8th Cir. 1991).

The United States Courts of Appeals also has held that a court applying state law with respect to fraud claims should also apply state law to determine the effect of a "no reliance" clause. Clements Auto Company v. Service Bureau Corporation, 444 F.2d 169 (8th Cir. 1971).[4]

The Fifth Circuit's position is that reliance is not justified where the contract contains an express disclaimer of reliance. Jackson v. Sam Finley, Inc., 366 F.2d 148 (5th Cir. 1966). That

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[4] Texas law limits a party's right to absolutely rely on "disclaimers" to cases where the parties are intending to fully and finally settle an existing controversy. Schlumberger Technology Corp. v. Swanson, 959 S.W. 2d 171 (Tex. 1997).

position was the position taken by the District Court in this case.

It is axiomatic that a party cannot contract away its own fraud. Various sellers, however, have devised a strategy intended to accomplish the same result. That strategy is at issue in this case. Specifically, sellers insert into the contract a statement that the buyer represents that it is not relying on any representations made by the seller and is instead relying on its own investigation. The sellers then take the position that they are free to make whatever representations they want to promote the sale without fear of liability for fraud.

The issue is an important matter because it is commonplace and because, in this case, it was used by an agency of the United States.

Obviously purchasers everyday sign contracts prepared by sellers that contain statements designed to protect the sellers wher the buyers have little or no idea of the impact of those statements.

Petitioners signed such documents without benefit of legal counsel. Freddie Mac provided substantial information. Freddie Mac answered

the questions asked by the Petitioners. The most obvious purpose of this information provided by Freddie Mac was to help the Petitioners decide whether or not to purchase the property. Petitioners presented competent summary judgment evidence that the information was false, that Freddie Mac knew the information was false, and that Petitioners relied to their detriment.

CONCLUSION

Petitioners, for summary judgment purposes, are deemed to have purchased property based on financial statements and other representations made by the Seller Freddie Mac which were false and which were known by Freddie Mac to be false. Included in the contracts[5] were statements that said the purchasers were not relying on any representations by Freddie Mac. These statements, under Texas law, do not preclude a fraud claim. The Fifth Circuit has taken a position that such a written "no reliance" statement in a contract can be conclusive that any reliance by the buyer is unreasonable and

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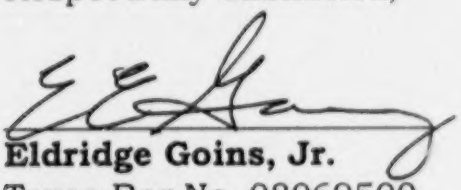
[5] The contract forms were provided by Freddie Mac.

precludes a fraud claim, which is in conflict with at least one other position of a United States Court of Appeals.

Respectfully submitted,



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Filed Dec. 17, 1997
Charles R. Fulbridge III, Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 96-11440

FEDERAL HOME LOAN MORTGAGE CORPORATION,

Plaintiff - Counter Defendant - Appellee
Cross Appellant

VS.

JOHN J. WALKER; MADELINE E. WALKER;
RICHARD J. WALKER; DAVID M. WALKER,

Defendants - Counterclaimants - Appellants Cross Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS
(3:92-cv-2635-P)

Before JOLLY, DUHE AND PARKER, Circuit Judges
PER CURIAM:[1]

AFFIRMED. See Fifth Circuit Rule 47.6.

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[1] Pursuant to 5th Cir. R. 47.5 the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4

Filed FEB 19, 1998
Charles R. Fulbridge III, Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 96-11440

FEDERAL HOME LOAN MORTGAGE CORPORATION,

Plaintiff - Counter Defendant - Appellee
Cross Appellant

v.

JOHN J. WALKER; MADELINE E. WALKER;
RICHARD J. WALKER; DAVID M. WALKER,

Defendants - Counterclaimants - Appellants
Cross Appellees

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

ON PETITION FOR REHEARING

Before JOLLY, DUHE AND PARKER, Circuit Judges

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is denied.

ENTERED FOR THE COURT:

_____

United States Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

FEDERAL HOME LOAN MORTGAGE CORP.,	§	
Plaintiff,	§	
vs.	§	CA3: 92-CV-2635-P
JOHN J. WALKER, MADELINE E. WALKER, DAVID M. WALKER, and RICHARD J. WALKER,	§	
Defendants.	§	

FEDERAL HOME LOAN MORTGAGE CORP.,	§	
Plaintiff,	§	
vs.	§	CA3: 93-CV-0696-P
CHAPEL CREEK PARTNERSHIP, BUCKNER PLACE PARTNERS, DAVID M. WALKER, RICHARD WALKER, EDWARD WALKER, and JOHN J. WALKER,	§	
Defendants.	§	

MEMORANDUM OPINION AND ORDER

Presently before the court for consideration in case number CA3: 92-CV-2635-P are:

(1) Plaintiff's Motion for Summary Judgment on Defendants' Counterclaims, filed January 18, 1994;

(2) Response to Motion for Summary Judgment by Counterclaimants John J. Walker, Madeline E. Walker, David M. Walker, and Richard J. Walker, filed February 7, 1994;

(3) Freddie Mac's Reply, filed February 22, 1994;

(4) Defendants John J. Walker's and Madeline E. Walker's Motion for Partial Summary Judgment, filed January 18, 1994;

(5) Freddie Mac's Response, file February 4, 1994;

(6) Reply Brief on Behalf of John J. Walker, Madeline E. Walker, David M. Walker and Richard J. Walker Regarding §16.069 of the Texas Civil Practice and Remedies Code, filed February 14, 1994;

(7) Federal Home Loan Mortgage Corporation's Objections to Summary Judgment

Evidence and Motion to Strike Affidavits Submitted by Defendants, filed February 22, 1994;

(8) Defendants/Counter-Claimants' Response and Brief to Federal Home Loan Mortgage Corporation's Objections to Summary Judgment Evidence and Motion to Strike Affidavits, filed March 14, 1994; and

(9) Federal Home Loan Mortgage Corporation's Reply to Defendants' Response and Brief to Federal Home Loan Mortgage Corporation's Objections to Summary Judgment Evidence and Motion to Strike, filed April 1, 1994.

Also pending before the Court for consideration in case number CA3: 93-CV-0696-P are:

(1) Plaintiff's Motion to Strike David and Richard Walker's Claim for Fraud in a Real Estate Transaction and John J. Walker's Counterclaim and to Strike Defendants' Demands for Punitive Damages, filed May 18, 1993;

(2) Response by Counterclaimants John Walker, David M. Walker and Richard

Walker to Freddie Mac's Motion to Strike, filed June 7, 1993;

(3) Freddie Mac's Consolidated Reply to Counterclaimants' Response to the Motion to Strike and Motion for Partial Summary Judgment, filed June 18, 1993;

(4) Motion for Partial Summary Judgment by Counterclaimants David M. Walker, Richard Walker and John J. Walker, filed June 7, 1993; and

(5) Reply Brief by Defendants, John J. Walker, David M. Walker and Richard Walker Regarding Their Motion for Partial Summary Judgment, filed July 1, 1993.

I. Nature of the Cases

In Case CA3: 92-CV-2365-P titled Federal Home Loan Mortgage Corp. v. John J. Walker, Madeline E. Walker, David M. Walker, and Richard J. Walker, Federal Home Loan Mortgage Corporation ("Freddie Mac") initially sued John and Madeline Walker for breach of contract related to a Promissory Note (the "Note") used to purchase the Northaven apartments, a multi-family complex located in northwest Dallas, Texas. John and Madeline Walker then counterclaimed for fraud,

statutory fraud in real estate transactions, negligent misrepresentation, Deceptive Trade Practices Act ("DTPA") violations, and intentional and reckless infliction of mental anguish (collectively, the "Counterclaims"). After discovery commenced, Freddie Mac added David and Richard Walker as Defendants and added claims for waste of the real property collateral securing the Note, conspiracy to commit waste, fraud and conspiracy to defraud, and tortious interference with contract. David and Richard Walker answered and repeated the Counterclaims asserted by their parents. All of the defendants have since abandoned their claims for negligent misrepresentation and breach of warranties under the DTPA.

Freddie Mac now moves for summary judgment in its favor with respect to all of Defendants' Counterclaims, as well as Defendants' claimed right to recover any sort of punitive or treble damages based on Defendants' five causes of action. Defendants John and Madeline Walker move for summary judgment on the application of §16.069 of the Texas Civil Practice and Remedies Code.

In Case CA3: 93-CV-0696-P titled Federal Home Loan Mortgage Corporation, plaintiff, v.

Chapel Creek Partnership, Buckner Place Partners, David M. Walker, Robert Walker, Richard Walker, Edward Walker, and John J. Walker, defendants, Plaintiff Freddie Mac filed against the named defendants for a deficiency judgment on two promissory notes used to purchase two other apartment complexes from Freddie Mac known as the Devonshire Apartments and Timber Park Apartments. When the defendants defaulted on the notes, Freddie Mac foreclosed on the properties and instituted this action to recover the amounts still owed to it. Defendants David Walker, Richard Walker, and John J. Walker counterclaimed that they are entitled to actual, statutory treble, and punitive damages because of Freddie Mac's common law fraud misrepresentation, statutory fraud in a real estate transaction, negligent misrepresentation, and violation of the DTPA. All of the defendants' counterclaims are based on the Northaven apartment purchase which is the basis of the CA3: 92-CV-2635-P suit.

Freddie Mac now moves to dismiss Defendants David and Richard Walker's claim for fraud in a real estate transaction, John J. Walker's entire counterclaim, and to strike all demands by the

Defendants for treble, exemplary, and punitive damages. Defendants/counterclaimants David M. Walker, Richard Walker, and John J. Walker also move for partial summary judgment on the issue of whether Freddie Mac is covered by the Federal Tort Claims Act.

II. Factual and Procedural Background

Defendants John and Madeline Walker borrowed $2,340,000 in a partial non-recourse note from Freddie Mac in January 1990 in order to purchase an apartment complex in Dallas known as the Northaven Racquet Club Apartments ("Northaven" or the "Property"). Northaven was sold by Freddie Mac to Richard Curtin, who then immediately sold it to John and Madeline Walker through the use of a Starker Trust in order for the Walkers to obtain significant tax advantages after selling their large home in Massachusetts. Thereafter, John and Madeline Walker authorized their sons, Richard and David Walker, to manage and operate Northaven.

During the first year of the loan, John and Madeline Walker were not required to make any Note payments whatsoever. They received four months' interest forgiveness, an additional eight

months of deferred interest, and twelve months deferred principal payments. With these cash savings and pursuant to written contracts, John and Madeline Walker were to infuse a minimum of $260,000 into Northaven for rehabilitation purposes in the first 15 months of ownership. They also were to maintain Northaven in good repair.

Beginning in August 1992, John and Madeline Walker did not make the required Note payments. By November 1992, with the Dallas Water Utilities threatening to shut down all water service to Northaven for lack of payment, Freddie Mac sued John and Madeline Walker and successfully moved for the appointment of a Receiver for Northaven in State Court. A Receiver was duly appointed and qualified. In December 1992, John and Madeline Walker removed this matter to Federal Court based on Federal question jurisdiction. All parties reached agreement with Dallas Water Utilities and it was dismissed from the case.

On March 2, 1993, with the Court's permission, Freddie Mac foreclosed on Northaven. There are no allegations that the foreclosure was improper in any way. The Receiver has been discharged.

On April 9, 1993, Freddie Mac brought action CA3: 93-CV-0696-H Federal Home Loan Mortgage Corporation v. Chapel Creek Partnership, et al. ("the Chapel Creek lawsuit") against John Walker and his various partners to collect deficiency judgments after foreclosing upon on the Devonshire apartment complex and the Timber Park apartment complex. These two apartment complexes were owned by the Chapel Creek Partnership and Buckner Place Partners and had been purchased in 1988 and 1989, respectively. John J. Walker and several of his sons are members of these partnerships. Madeline Walker is not a member of these partnerships. The partnerships defaulted upon their obligations under two separate promissory notes secured by these apartment complexes in Dallas. In this suit, John Walker, along with David and Richard Walker, responded to Freddie Mac's suit on the two separate properties and promissory notes by bringing the same counterclaims asserted in the Northaven lawsuit. The Walkers also contend that the market values of the properties are far in excess of Freddie Mac's bids, and that the value of the foreclosed properties is more than sufficient to satisfy any debt to

Freddie Mac, including on the Chapel Creek Note and the Buckner Note.

On November 30, 1993, this Court ordered the counterclaims asserted in the Chapel Creek lawsuit to be consolidated with the Northaven lawsuit.

III. Undisputed Facts

1. Freddie Mac is a corporation created by an Act of Congress under 12 U.S.C. §1451 *et seq.* Freddie Mac functions as a financial intermediary between mortgage originators and the general capital markets, increasing the availability of residential mortgage loans and thereby fostering increased mortgage credit for home buyers across the country.

2. On November 18, 1988, David M. Walker, as Managing Partner of Chapel Creek Partnership, executed and delivered a Multifamily Note in the amount of $750,000.00 (the "Chapel Creek Note"). Such note was secured by one certain Multifamily Deed of Trust, Assignment of Rents and Security Agreement. The Note was eventually assigned to Freddie Mac.

3. The Chapel Creek Partnership defaulted in payment of the Chapel Creek Note by

failing to pay the monthly payment and interest payments for the months of November 1992 through February 1993. By reason of such defaults, Freddie Mac accelerated the maturity of the Chapel Creek Note.

4. On March 2, 1993, Freddie Mac sold the property securing the Chapel Creek Note at a nonjudicial Substitute Trustee's foreclosure sale. Freddie Mac purchased the property at the sale for $500,000.00 which amount was credited against the indebtedness owed on the Chapel Creek Note.

5. On June 6, 1989, David M. Walker, as Managing General Partner of Buckner Place Partners, executed and delivered a Multifamily Note in the amount of $1,300,000.00 (the "Buckner Place Note"). Such note was secured by one certain Multifamily Deed of Trust, Assignment of Rents and Security Agreement. The Note was eventually assigned to Freddie Mac.

6. The Buckner Place Partners defaulted in payment of the Buckner Note by failing to pay the monthly payment and interest payments for the months of November 1992 through February 1993. By reason of such defaults, Freddie Mac accelerated the maturity of the Buckner Note.

7. On March 2, 1993, Freddie Mac sold the real property securing the Buckner Note at a nonjudicial Substitute Trustee's foreclosure sale. Freddie Mac purchased the property for $700,000.00, which amount was credited against the indebtedness owed on the Buckner Note.

8. Freddie Mac acquired Northaven in a nonjudicial foreclosure action in June 1989. Thereafter, it listed Northaven for sale with a real estate broker for an asking price of $2.7 million cash.

9. David Walker, on behalf of John and Madeline Walker, offered to purchase Northaven in June 1989 for $2.4 million, in July 1989 for $2.6 million, in August 1989 for $2.6 million and in September 1989 for $2.7 million. All offers required financing from Freddie Mac. Freddie Mac rejected these offers.

10. Freddie Mac decided to sell Northaven at an auction in December 1989 with a minimum required cash bid of $1.8 million. Accordingly, a Bid Package ("Bid Package") regarding Northaven was prepared by JBS & Associates, the auctioneer. Defendants, who acquired a copy of the Bid Package in November 1989, unsuccessfully attempted

to obtain third party financing in order to bid at the auction.

11. The Bid Package contained a written disclaimer stating, "The information contained in this brochure is subject to inspection by all appropriate parties. All information regarding the properties has been obtained by seller from third parties. No liability for its accuracy, errors, or omissions is assumed by the seller or its agent . . .". The Package further stated that:

> Disclosure: It should be noted by the prospective purchaser that the property was acquired by the Seller through a foreclosure process or by a deed-in-lieu of foreclosure. Therefore, the availability of historical Income and Expense information and explanations of variances in the given figures may be limited. In order to aid a prospective purchaser in his analysis of the property for sale, the Seller has made available the Income and Expense information of the property to the extent that the information was available to the Seller. The Seller makes the information available solely for the purpose of disclosing that the Seller has such information, but makes no representations, warranties, or other assertions, express or implied, with respect to the accuracy or content of such information.

The brochure also contained the following statement:

> All information contained herein is obtained from sources deemed reliable, but neither the seller nor JBS & Associates [the auctioneer] make any representations, Warranties or assertions, express or implied, with respect to the accuracy or content of such information.

12. When no qualified bidders presented themselves at the auction site, the auction did not go forward.

13. Thereafter, on December 12, 1989, John and Madeline Walker, through David Walker, made a new written offer to purchase Northaven for $2.6 million (using a tax vehicle) with financing of $2,340,000 provided by Freddie Mac. Freddie Mac ultimately accepted this offer. Neither David nor Richard Walker had the financial ability to purchase Northaven, but John and Madeline Walker needed to acquire a multi-family property by January 1990 in order to accomplish a "tax swap" and save money in taxes.

14. Their offer letter contained a paragraph which read:

> Disclaimer: Except for any warranties contained in the deed, Purchaser acknowledges that Seller disclaims any warranty or representation concerning the nature and condition of the Property or any lease, lien, encumbrance, reservation or condition with respect thereto or the compliance of the Property or its operation with applicable laws, ordinances and regulations. PURCHASER SHALL ACCEPT THE PROPERTY 'AS IS', WITHOUT WARRANTY OR REPRESENTATION OF SELLER, EXPRESS OR IMPLIED, OR ARISING BY OPERATION OF LAW INCLUDING, BUT NOT LIMITED TO, ANY WARRANTY OF CONDITION, HABITABILITY, MERCHANTABILITY, OR FITNESS FOR A PARTICULAR PURPOSE OF THE PROPERTY.

(emphasis in original). It also stated:

> Purchaser further acknowledges and agrees: . . . (e) any information provided and/or to be provided by Freddie Mac and/or their respective agents and employees (as applicable) with respect to the Property was (or will be) obtained from a variety of sources, and Seller, and their respective agents and employees (as applicable) make no representations or warranties whatsoever as to the accuracy or completeness of such information because (i) such information is expressly no guaranteed and (ii) Purchaser has not re-

> lied and will not rely on such information in its consideration of the Property but will rely exclusively on its own investigation to determine whether to purchase the Property.

This document was signed by David Walker.

15. On January 17, 1990, Freddie Mac sold Northaven to Richard Curtin, who immediately sold it to John and Madeline Walker in order to effect the "tax swap."

16. The Multifamily Property Sales Agreement between Freddie Mac and Richard Curtin stated at ¶21:

> No Representations. Except as expressly set forth herein or called for in any of the instruments attached as exhibits hereto, SELLER MAKES NO WARRANTIES OR REPRESENTATIONS of any kind or character, express or implied with respect to the Property or the Personal Property, their physical condition (including but not limited to the presence of any Hazardous Material on or in either the Property or Personal Property), the income to be derived therefrom, the expenses to be incurred with respect thereto, or any other matter relating to or affecting the same, and there are no oral agreements, warranties, or representations collateral to or affecting the Property

> or the Personal Property except as may be expressly set forth herein.

(emphasis in original). The agreement also contained an addendum which acknowledged that John and Madeline Walker were the actual purchasers of the Property.

17. Also on January 17, 1990, Freddie Mac made a loan in the principal amount of $2,340,000.00 to John and Madeline Walker for the purchase of Northaven. The loan is evidenced by a Multifamily Note executed by John and Madeline Walker and is secured by, *inter alia*, a Multifamily Deed of Trust, Assignment of Rents and Security Agreement (the "Deed of Trust").

18. In November 1992, Freddie Mac filed suit against John and Madeline Walker in Texas state court where the appointment of a receiver was obtained. Thereafter, the case was removed to Federal court.

19. On March 2, 1993, Freddie Mac foreclosed on Northaven.

IV. Plaintiff's Objections to Summary Judgment Evidence and Motion to Strike Affidavits Submitted by Defendants in Case No. CA3: 92-CV-2635-P

Freddie Mac both objects to the documents submitted by Defendants in their Response to Plaintiff's Motion for Summary Judgment and moves to strike the affidavits submitted in support of such response by Counterclaimants John J. Walker, Madeline E. Walker, David M. Walker, and Richard J. Walker, Specifically, Freddie Mac requests the Court to strike the Affidavit of Madeline E. Walker in its entirety, as being rife with perjury, half-truths,, and information clearly beyond the personal knowledge of the affiant. As to Defendant Richard Walker's affidavit, Freddie Mac moves the Court to strike those statements which are not based on his personal knowledge, contradict his earlier sworn statements, or fail in any way to comply with the evidentiary guidelines of the Federal Rules. The same request is made for the affidavits of John J. Walker and David Walker. Freddie Mac also objects to any references to Michael Atwood's report and Roland Freeman's affidavit, asserting that these document constitute inadmissible hearsay. Lastly, Freddie Mac objects to the affidavit of J. Robert Forshey, as two of his affidavits contain allegedly inadmissible hearsay evidence.

As the Court dismisses all of Defendants' counterclaims as outlined below, it is unnecessary for the Court to reach the merits of Plaintiff's objections. The Court is therefore of the opinion that Plaintiff's Objections should be denied as being moot.

V. Motions for Summary Judgment

The Court first determines what standards are applicable to summary judgment. Summary judgment shall be rendered when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 323025 (1986); Thomas v. Harris County, 784 F.2d 648, 651 (5th Cir. 1986). All evidence and the inferences to be drawn therefrom must be viewed in the light most favorable to the party opposing the motion. Marshall v. Victoria Transp. Co., 603 F.2d 1122, 1123 (5th Cir. 1979). The party defending against a motion for summary judgment cannot defeat the motion unless it provides specific facts that show the case presents a genuine issue of

material fact, such that a jury might return a verdict in its favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256-57 (1986). Once the moving party has made an initial showing, the party opposing the motion must come forward with competent summary judgment evidence of the existence of a genuine fact issue. Matsushita Electrical Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).

The party moving for summary judgment need not produce evidence showing absence of a genuine issue of material fact with respect to an issue on which the non-moving party bears the burden of proof. Celotex Corp., 477 U.S. at 235. The party moving for summary judgment need only show that the party who bears the burden of proof has produced no evidence to support an essential element of its case. Id. If the non-moving party fails to make a showing sufficient to establish the existence of an element essential to its case and on which it will bear the burden of proof at trial, summary judgment must be granted. Id. at 322-23.

A. Defendant John and Madeline Walkers' Motion for Partial Summary Judgment in CA3: 92-CV-2635-P

Defendants move for partial summary judgment on the applicability of §16.069 of the Texas Civil Practice & Remedies Code to their counterclaims. As all of Defendants' DTPA counterclaims are dismissed as set out below, the Court does not reach the merits of this motion. Therefore, the Court is of the opinion that Defendants' Motion should be denied as being moot.

B. Plaintiff's Motion for Summary Judgment on Defendants' Counterclaims in CA3: 92-CV-2635-P

1. *Counterclaims for Common Law Fraud and Statutory Fraud in Real Estate Transactions*

Plaintiff moves for summary judgment on Defendants' fraud-based counterclaims, asserting that Defendants cannot, as a matter of law, establish, one or more of the necessary elements as to these causes of action. The elements of common law fraud are: (1) a false representation, (2) about a material fact, (3) made with knowledge of its falsity, (4) with the intent to deceive the other party, (5) and the other party actually relies on the

false representation, (6) to its injury. Pence v. United States, 326 U.S. 332, 338 (1942); DeSantis v. Wackenhut, 793 S.W.2d 670, 688 (Tex. 1990), cert. denied, 498 U.S. 1048 (1991). The elements for fraud in a real estate transaction require (1) a false representation (2) made to a person for the purpose of inducing that person to enter into a contract, (3) which is relied on by that person (4) in entering into that contract. Tex. Bus. & Com. Code §27.01(a).

Both common law fraud and statutory fraud in real estate transactions require an intent to deceive. Plaintiff contends that Defendants cannot show either an intent to deceive. As support for its contention, Plaintiff indicates that (1) the Bid Package includes numerous disclaimers as to its accuracy; (2) in their own offer letters to purchase Northaven, Defendants repeatedly stated that the purchase of Northaven was without warranties, guaranties, or representations of any kind from Freddie Mac; (3) Duane Bulla, Dennis Downey, and Christie Montgomery who Defendants accuse of making the misrepresentations have each expressly denied an intent to mislead; (4) Defendants John and Madeline Walker expressly denied that

any representations ever were made to them by anyone connected with Freddie Mac; and (5) Defendants John and Madeline Walker never had any direct communications with Freddie Mac other than a brief introduction at the closing of the sale of Northaven. Alternatively, Plaintiff argues that Defendants cannot show any reliance, especially justifiable reliance. As support for this argument, Plaintiff offers that (1) in the offer that ultimately was accepted by Freddie Mac, Defendants specifically represented that they were not relying on any information received from Freddie Mac at any time; (2) Defendants demanded and received an inspection period specifically in order to conduct their own due diligence; and (3) the actual contracts of sale repeated that Defendants were acquiring Northaven without any warranties or representations. Plaintiff also protests against Defendants' "evidence", claiming that much of it is barred by the parol evidence rule.

In turn, Defendants argue that the bid Package disclaimers are ineffective to bar or limit claims for fraud. Further, they contend that their submitted evidence is admissible despite the parol evidence rule because fraud is an exception to that

rule. It is well established in Texas that parol evidence indicating fraud is admissible in contract actions. Dallas Farm Machinery Co. v. Reaves, 307 S.W.2d 233, 233 (Tex. 1957); see also Coleman v. Forister, 514 S.W.2d 899, 903 (Tex. 1974) (fraud is an exception to parol evidence rule).

In support of their fraud-based claims, Defendants allege the following facts. First, Freddie Mac, through its employees made misrepresentations concerning the Northaven's financial status. At a lunch meeting following the December 1989 auction, Dennis Downey, Freddie Mac's Regional Director for Multifamily Operations, Southwest Region, and Duane Bulla, Freddie Mac's Regional Service Manager, expressly represented to Richard and David Walker that the financial information contained in the Bid Package was accurate, and that Northaven had generated $15,000 in net operating income ("NOI") per month for the period of June 1 through September 30, 1989. At this same meeting, Mr. Downey and Mr. Bulla allegedly made no disclaimers or limitations regarding the accuracy of this information.

At the same luncheon, the Walkers reportedly inquired as to the financial performance of

Northaven in the intervening two months. In response, Mr. Downey and Mr. Bulla represented to them that Northaven's gross income and NOI had increased for the months of October and November. Additionally, the two allegedly expressly represented that the NOI for both of these months, less taxes, insurance and management expense, was more than $15,000 per month. The Walkers claim that neither Mr. Downey nor Mr. Bulla made any disclaimers or limitations as to the accuracy of this information.

David and Richard Walker further assert that Mr. Downey and Mr. Bulla also expressly represented to them that the NOI generated by Northaven in the amount of $15,000 together with the monthly management fee of approximately $4500 would be sufficient for debt service using the proposed sale terms. the Walkers claim that Mr. Downey and Mr. Bulla insisted that Northaven was worth $2.6 million based upon its monthly NOI in excess of $15,000. David and Richard Walker allegedly conveyed all of this information to their parents. The senior Walkers contend that they relied on these alleged representations in offering to purchase Northaven for $2.6 million.

Second, the Walkers maintain that the financial information contained in the Bid Package was inaccurate, and Northaven was generating far less than $15,000 in NOI per month. They base their contentions on reports prepared for Freddie Mac by Northaven's management company, Republic Realty Services ("Republic"). These reports indicate a gas bill for September 1989 of $25,000 which is not reflected in the Bid Package financial Statements. Republic further projected a negative NOI for September 1989 of $2,125. Actual operating reports for the two months of October and November 1989 allegedly reported loss of $28,160 and $5,532, respectively. An employee of Republic testified that Northaven did not generate $15,000 in monthly NOI, rather it generated approximately $2,000 monthly NOI.

Third, the Walkers offer evidence that Dennis Downey reviewed and approved the information contained in the Bid Package. There is additional deposition testimony that Duane Bulla possibly also reviewed the same information. Lastly, the Walkers discovered that Freddie Mac had obtained an appraisal for Northaven prior to originally foreclosing on the property. In the appraiser's opin-

ion, the highest and best use for Northaven included demolishment based upon the projected net operating losses.

Upon review of this evidence, including the letters written by the Walkers prior to the purchase, the Bid Package, and the Sales Agreement, the Court concluded that the Walkers' claims for fraud did not survive summary judgment. The evidence demonstrates that the Walkers are sophisticated investors and were on sufficient notice that Freddie Mac did not warrant the accuracy of any financial representations, oral or written. The numerous disclaimers made by Freddie Mac outweigh any oral affirmations made by Messrs. Downey and Bulla. Given this scenario, the Walkers cannot stand on their assertion that they relied upon the representations made by Downey and Bulla. Therefore, the Court is of the opinion that Plaintiff's motion for summary judgment regarding Defendants' counterclaims for common law fraud and statutory real estate fraud should be granted.

Further, statutory real estate fraud cannot exist when there is no contract for the sale of land or stock between the parties. Texas Commerce Bank Reagan v. Lebco Constructors, Inc., 865

S.W.2d 68, 82 (Tex.App.--Corpus Christi 1993, n.w.h.). Plaintiff asserts that Defendants Richard and David Walker cannot maintain this counterclaim because they never entered into a contract with Plaintiff. Defendants Richard and David Walker concede their claim. (See Br. on behalf of John J. Walker, Madeline E. Walker, David M. Walker and Richard J. Walker in resp. to Pl.'s Mot. for Summ. J., p. 12, fn. 2). The proffered evidence clearly demonstrates that Richard and David Walker never entered into a contract with Plaintiff. Therefore, any counterclaim asserted by them relating to statutory fraud in real estate transactions must fail as a matter of law on this basis also.

2. *Deceptive Trade Practices Act*

Plaintiff moves for summary judgment on Defendants' claims under the Deceptive Trade Practices Act ("DTPA"), Tex. Bus. & Com. Code § 17.41 et seq., asserting that (1) none of the Defendants qualify as consumers under the DTPA, (2) Freddie Mac provided proper notice of a third-party source for information, (3) the Defendants have failed to establish essential elements of the DTPA cause of action, and (4) Freddie Mac, as a corporate instrumentality of the Untied States, is not

subject to the treble damages provisions of § 17.50 (b) (1) of the DTPA.

a. Defendants' Status as Consumers Under the DTPA

Tex. Bus. & Com. Code § 17.45 (4) defines a consumer as "an individual, partnership, corporation, this state, or a subdivision or agency of this state who seeks or acquires by purchase of lease, any goods or services. . .". Id. Initially, Defendants must show that they are consumers. 3Z Corp. v. Stewart Title Guaranty Co., 851 S.W.2d 933, 936-37 (Tex.App.--Beaumont 1993, writ denied: Accord, Luker v. Arnold, 843 S.W.2d 108, 111 (Tex.App.--Ft. Worth 1992, no writ). This is a question which the Court determines, 3Z Corp., supra, unless some factual elements are disputed. Luker, supra. Privity between Plaintiff and Defendants are afforded consumer status under the DTPA. Flenniken v. Longview Bank & Trust Co., 661 S.W.2d 705, 707 (Tex. 1983). Defendants establish their standing in terms of their relationship to the transaction which forms the basis of their complaint, not by any contractual relationship with Plaintiff. Id. The consumer must only show that the property sought or acquired forms the

basis of his complaint. Id., Accord Cameron v. Terrell & Garrett, Inc., 618 S.W. 2d 535, 539 (Tex. 1981).

As the undisputed facts clearly indicate, Defendants John and Madeline Walker acquired Northaven from Richard Curtin, who, in turn, had acquired it from Freddie Mac. Thus, Defendants John and Madeline Walker have standing as consumers under the DTPA. As to Defendants David and Richard Walker, Plaintiff insists that they lack standing as consumers, in part because they were not the parties who actually purchased Northaven.

As the Texas Supreme Court makes clear in Kennedy v. Sale, 689 S.W.2d 890, 892 (Tex. 1985), consumer status is not precluded because the person seeking or acquiring the goods is not the one who actually purchases or leases them. Instead, the test focuses on whether the alleged consumer sought or acquired the goods. Precision Sheet Metal Mfg. v. Yates, 794 S.W.2d 545, 551 (Tex.App.--Dallas 1990, writ denied). Further, in determining whether David and Richard Walker sought or acquired Northaven, they must establish that they had some relationship to the purchase of Northaven. See Lara v. Lile, 828 S.W.2d 536, 542

(Tex.App.--Corpus Christi 1992, writ denied) (person who has no relationship to the sales transaction may not be a consumer under the DTPA). Thus, Defendants David and Richard Walker may be consumers if they "sought" or "acquired" Northaven by proving that it had been purchased by their parents for their children's benefit. See Id. at 541 (plaintiff may "acquire" goods that have been purchased by another for the benefit of the plaintiff).

The question, then, is what benefit David and Richard Walker received from their parents' purchase of Northaven. They allege that they sought to acquire Northaven as a part of the Walker family group and, as a part of the Walker family group, they acquired substantial benefit from the transaction. In addition, David and Richard Walker managed and operated Northaven. These allegations are insufficient to establish that David and Richard Walker are "consumers" under the DTPA. No evidence has been submitted indicating that John and Madeline Walker intended their sons to have some legal right in the ownership of Northaven. Further, although their parents retained their son's services as managers of the

complex, this is not the type of benefits necessary to convey "consumer" status as envisioned by the DTPA. See Kennedy, 698 S.W.2d 892. (insurance policy purchased by employer benefited employee covered under policy); also Superior Trucks, Inc. v. Allen, 664 S.W.2d 136, 148 (purchase of truck by one owner of business benefited other owner); also Precision Sheet Metal, 794 S.W.2d at 551 (fact issue remained whether president of company which had purchased tract of land was consumer); compare, Rodriguez v .Ed Hicks Imports, 767 S.W.2d 187, 191 (Tex.App.--Corpus Christi 1989, no writ) (passenger in car which had been purchased by and for someone else was not consumer); also Lara, 828 S.W.2d at 542 (employee injured by third-party trucking service did not acquire service a transportation was primary service acquired by employee's employer.

b. The Producing Cause Element

Here, Plaintiff asserts that Defendants fail to establish any link between the alleged conduct of Freddie Ma and any damage they may have suffered. The Court agrees. Defendants base their counterclaim on oral representations allegedly made by Freddie Mac's agents concerning the NOI

of Northaven. Due to the substantial number of written disclaimers concerning these figures, the Court finds that, as knowledgeable participants in the real estate market, Defendants could not have relied on any oral representations as they had sufficient warning and opportunity to investigate the financial history of the apartment complex. Thus, any oral statements made by Messrs. Downey and Bulla cannot be considered a producing cause of any of Defendants" damages. Plaintiff's motion on this issue should be granted. As Plaintiff's motion is granted, Plaintiff's defense of proper notice under § 17.506(a) (2) then becomes irrelevant.

c. Availability of Treble Damages Against Freddie Mac

As discussed infra, punitive damages are not available as against Plaintiff. As treble damages under the DTPA are construed as punitive damages, Pace v. Texas, 650 S.W.2d 64, 65 (Tex. 1983), they are also not available as against Plaintiff.

3. *Intentional and Reckless Infliction of Mental Anguish*

Defendants have counterclaim against Plaintiff alleging that Plaintiff's alleged misrepre-

sentations concerning the net operating income cash flows inflicted mental anguish or emotional distress upon them. Under federal law, there is not cognizable cause of action for emotional distress. McDermott v. Western Union Tel. Co., 746 F.Supp. 1016, 1024 (E.D. Cal. 1990). Texas law recognizes a cause of action for intentional infliction of emotional distress. This tort requires that 91) the defendant acted intentionally or recklessly, (2) the conduct was extreme and outrageous, (3) the actions of the defendant caused the plaintiff emotional distress, and (4) the emotional distress suffered by the plaintiff was severe. Twyman v. Twyman, 855 S.W.2d 619, 621 (Tex. 1993). In order for the alleged conduct to qualify as outrageous, it must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Id. at 621.

In this case, the Court finds that Freddie Mac's alleged misrepresentations do not arise to that level of conduct which constitutes intentional inflection of emotional distress. Misrepresentation of financial figures during a business transaction

might cause some distress, but not the kind envisioned by this cause of action. Further, Texas law fails to recognize a cause of action for negligent infliction of emotional distress. Boyles v. Kerr, 855 S.W.2d 593 (Tex. 1993). This is true also for reckless infliction of emotional distress.

4. *Punitive Damages*

Plaintiff also moves for summary judgment on Defendants' counterclaim for punitive or treble damages. Defendants assert that punitive damages are available to them through the "sue and be sued" clause in its Congressional charter, Defendants' argument is that as Freddie Mac has assumed the status of a private commercial enterprise, then it is subject to penalties like punitive damages.

The Court disagrees. Although Freddie Mac is a for-profit, shareholder-owned corporation, it remains subject to considerable oversight by the federal government. Further, even though its is a quasi-private enterprise, "a federal instrumentality does not divest itself of the privileges of instrumentality status when it acts more like a privately-owned institution than a federal agency." Smith v. Russellville Production Credit Asso., 777 F.2d

1544, 1550 (11th Cir. 1985). A federal instrumentality is exempt from punitive damages unless Congress expressly grants litigants permission to sue for such damages. See In re Sparkman, 703 F.2d 1097, 1101 (9th Cir. 1983); Painter v. Tennessee Valley Authority, 476 F.2d 943, 944 (5th Cir. 1973). As Congress fails to do so in regards to Freddie Mac, then Freddie Mac is not subject to punitive damages claims. See Paley v. Federal Home Loan Mortgage Corp., 1994 WL 327659 (E.D. Pa. 1994) (FHLMC not subject to punitive damages). The Court finds that Defendants' counterclaims for punitive or treble damages should be dismissed.

C. Defendants' Motion for Partial Summary Judgment in CA3: 93-CV-0696-P

Defendants/counterclaimants David M. Walker, Richard Walker, and John J. Walker move for summary judgment on the issue of whether Freddie Mac is covered by the Federal Tort Claims Act, 28 U.S.C. § 2671, and thus not subject to punitive or exemplary damages. As discussed above, Freddie Mac is not subject to punitive or exemplary damages. For this reason, Defen-

dants/counterclaimants motion for partial summary judgment should be denied.

V. Plaintiff's Motion to Strike in CA3: 93-CV-0696-P

In this motion, Freddie Mac moves to dismiss Defendants David and Richard Walker's claim for fraud in a real estate transaction and Defendant John J. Walker's entire counterclaim. Freddie Mac further moves to strike all demands by the Defendant for treble, exemplary, and punitive damages. As the Court has already found that Defendants Richard and David Walker's counterclaims for statutory real estate fraud fail as a matter of law in CA3: 92-CV-2635-P, the same counterclaims asserted in this action must be dismissed pursuant to Fed.R.Civ.P. 12(b) (6). Therefore, Plaintiff's motion on this point should be granted. Regarding Plaintiff's motion to dismiss Defendant John J. Walker's entire counterclaim, as the Court has previously ordered these counterclaims to be consolidated with the counterclaims asserted in the Northaven lawsuit, Plaintiff's motion should be granted. Lastly, as discussed above, Freddie Mac is not subject to treble, punitive, or exemplary damages. For this reason,

Plaintiff's motion to strike such demands should be granted.

VI. Conclusion and Order

Based on the foregoing, the Court hereby ORDERS that:

(1) Plaintiff's objection to Summary Judgment Evidence and Motion to Strike Affidavits Submitted by Defendants is DENIED as being moot.

(2) Defendants John and Madeline Walker's Motion for Partial Summary Judgment regarding the applicability of § 16.069 to their DTPA claims is DENIED as being moot;

(3) Plaintiff's Motion for Summary Judgment on Defendants' Counterclaims is decided as follows:

(a) GRANTED as to Defendants' counterclaims for common law fraud;

(b) GRANTED as to Defendants' Counterclaims for statutory fraud in real estate transactions;

(c) DENIED as to Defendants John J. and Madeline E. Walker's standing as consumers under DTPA;

(d) GRANTED as to all of the Defendants' claims under the DTPA;

(e) GRANTED as to Defendants' Counterclaims for Intentional and Reckless Infliction of Mental Anguish; and

(f) GRANTED as to Defendants' Counterclaims for punitive damages.

(4) Motion for Partial Summary Judgment by Counterclaimants David M. Walker, Richard Walker and John J. Walker is DENIED.

(D) Plaintiff's Motion to Strike David and Richard Walker's Claim for Fraud in a Real Estate Transaction and John J. Walker's Counterclaim and to Strike Defendants' Demands for Punitive Damages is GRANTED.

(6) The remaining issues for trial is on the promissory note itself in CA3: 92-CV-2635-P and the value of the foreclosed properties in CA3: 93-CV-0696-P.

(7) All Motions in Limine and Objections to Trial Exhibits and Witnesses filed by both parties in CA3: 92-CV-2635-P are hereby DISMISSED as moot as these pleadings relate solely to the issues decided by this memorandum opinion and order.

SO ORDERED this 29th day of September 1994.

Jorge A. Solis
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

FEDERAL HOME LOAN MORTGAGE CORPORATION	§	
Plaintiff,	§	
v.	§	CIVIL ACTION NO. 3:92-CV-2635-P
JOHN J. WALKER, MADELINE E. WALKER, DAVID M. WALKER and RICHARD J. WALKER,	§	
Defendants.	§	

MEMORANDUM OPINION AND ORDER

Now before the Court are:

1. Plaintiff's Motion for Summary Judgment on Promissory Note and Brief in Support Thereof, filed February 21, 1995;

2. Affidavit of Gregory S. Stuart, filed February 21, 1995;

3. Affidavit of Sally C. Helppie on Attorneys' Fees, filed February 21, 1995;

4. Response to Motion for Partial Summary Judgment, filed March 8, 1995;

5. Plaintiff's Reply to Defendants' Response to Plaintiff's Motion for Summary Judgment on Promissory Note, filed March 17, 1995;

For the reasons stated below, the Court finds that Plaintiff's Motion for Summary Judgment on Promissory Note should be GRANTED to the extent explained below.

BACKGROUND

A brief history of this case is in order. Because at least some of the Defendants in this matter previously declared bankruptcy, this case has been stayed for some time pursuant to the automatic stay provision under Bankruptcy Code § 362. On November 28, 1995, however, United States Bankruptcy Judge C. Houston Abel ordered that the stay be lifted "to allow Federal Home Loan Mortgage Corporation to proceed to judgment in the District Court Suit entitled Federal Home Loan Mortgage Corporation v. John J. Walker, Madeline E. Walker, Richard J. Walker, and David M. Walker." Order Approving Agreed Stipulation to Modify Automatic Stay Pursuant to Bankruptcy Rule 4001(d) at 1-2 (Bnkr. E.D. Tex. 1995). Accord-

ingly, this matter is now properly before the Court for determination.

Plaintiff Federal Home Loan Mortgage Corporation ("Freddie Mac") brings this motion for partial summary judgment on its claim for breach of a promissory note (the "Note") by Defendants John J. Walker and Madeline E. Walker (collectively the "Walkers" or "Defendants"). In response, the Walker's assert various affirmative defenses.

The promissory note in question, dated January 17, 1990, evidences a loan issued by Freddie Mac in the original principal amount of $2,340,000 to the Walkers to finance the purchase of the Northaven Racquet Club Apartments ("Northaven"). As security for the Note, the Walkers entered into a Multifamily Deed of Trust, Assignment of Rents and Security Agreement (the "Deed of Trust"), dated January 17, 1990, which encumbers, among other things, Northaven. Freddie Mac is the current owner and holder of the Note and the Deed of Trust.

Since July of 1992, the Walkers have made no payments under the Note. Accordingly, Freddie Mac accelerated the outstanding principal indebtedness under the Note, notified the Walkers of

their default, and demanded payment in full. After the time for payment expired, with permission of the Court, Freddie Mac foreclosed on and sold Northaven for a bid price of $1,440,000, on or about March 2, 1993.

It is before this Court today to decide (1) whether, as a matter of law, the Walkers have breached the agreement evidenced by the Note, and (2) if so, what amount, if any, the Walkers owe Freddie Mac under the Note.

SUMMARY JUDGMENT STANDARD

Summary judgment shall be rendered when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(d); Celotex Corp. v. Catrett, 477 U.S. 317, 323-25 (1986); Thomas V. Harris County, 784 F.2d 648, 651 (5th Cir. 1986). All evidence and the inferences to be drawn therefrom must be viewed in the light most favorable to the party opposing the motion. Marshall v. Victoria Transp. Co., 603 F.2d 1122, 1123 (5th Cir. 1979). The party defending against a motion for summary

judgment cannot defeat the motion unless he provides specific facts that show the case presents a genuine issue of material fact, such that a jury might return a verdict in his favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256-57 (1986).

Once the moving party has made an initial showing, the party opposing the motion must come forward with competent summary judgment evidence of the existence of a genuine fact issue. Matsushita Electrical Industrial Co. v. Zenith Radio Corp., 475 U. S.574, 586 (1986). Mere assertions of a factual dispute unsupported by probative evidence will not prevent summary judgment. Anderson, 477 U. S. at 248-50; Abbott v. Equity Group Inc., 2 F.3d 613, 619 (5th Cir. 1993). In other words, conclusory statements unsupported by evidentiary facts will not suffice to defeat a motion for summary judgment. Falls Riverway Realty, Inc. v. Niagara Falls, 754 F.2d 49 (2d. Cir. 1985). If the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to his case and on which he will bear the burden of proof at trial, summary judgment must be granted. Celotex, 477 U. S. at 322-23.

The Court has no duty to search the record for triable issues. Guarino v. Brookfield Township Trustees, 980 F.2d 399, 403 (6th Cir. 1992). The Court need only rely on the portions of submitted documents to which the nonmoving party directs. Id. at 403.

ANALYSIS

I. Breach of Promissory Note

It is undisputed that the Walkers are in default on the Note and that therefore, absent some defense, they should be liable under the Note. By way of defense, the Walkers assert that they are not liable because their entry into the Note agreement was induced by fraud in violation of the DTPA, common-law fraud principles, and the Texas statutory fraud provisions. The Walkers further contend that they are not in breach because Freddie Mac's allegedly fraudulent conduct resulted in a failure of consideration.

As a matter of law, the Court finds that the Walkers' affirmative defenses are of no avail. With respect to the Walkers' affirmative defenses based on the DTPA, common-law fraud principles, and the statutory fraud provisions, the Walkers have failed to prove a fact issue with respect to each

element of each of these defenses. This conclusion is apparent for the reasons set forth in the Court's previous Summary judgment Order, filed September 29, 1994, in which the Court granted summary judgment against the Walkers on their fraud-based counterclaims. Because the Walkers' above-mentioned affirmative defenses are premised on the same facts already determined against them with respect to their counterclaims, their affirmative defenses must fail.

Finally, the Walkers' affirmative defense based on failure of consideration fails for the same reasons. The only facts the Walkers allege in support of that defense are the same facts that the Walkers alleged concerning their counterclaims and other affirmative defenses. Again, because those facts have been previously determined against the Walkers, their affirmative defense based on failure of consideration fails as a matter of law.

Accordingly, the Court finds that summary judgment on Freddie Mac's claim for breach of promissory note should be and is, hereby, GRANTED.

II. Amount Owed Under the Note

Therefore, the Court is now left with the task of determining the amount the Walkers' owe under the Note. It is undisputed that under the terms of the Note (more specifically under the "Required Principal Reduction Provision"), the Walkers are personally liable for 10% of the original principal balance less any payments made by the Walkers towards the principal.[1] It is further undisputed that the remaining 90% of the original principal balance is nonrecourse. With respect to all interest payable under the Note and all costs, expenses, and attorneys' fees expended on collection efforts, Freddie Mac contends that the Walkers are personally liable pursuant to a clause providing that the Walkers are "personally liable for the payment of all other amounts payable under the Note" (the "Other Amounts Provision").

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[1] In the figures tendered by Freddie Mac, no allowance was made for any previous payments made by the Walkers towards the principal, even though the Walkers apparently did in fact make payments under the Note from February 1991 until June 1992, some of which presumably went towards principal. According, the Court directs Freddie Mac to adjust downward, to reflect any previous principal payments, the amount it claims the Walkers owe pursuant to the Required Principal Reduction Provision.

The Walkers challenge Freddie Mac's position on the grounds (1) that the Principal Reduction Provision provides a cap on personal liability; (2) that pursuant to the Deed of Trust, any other amounts for which the Walkers are personally liable should be set-off by the proceeds of the foreclosure sale; and (3) that even if the Walkers are liable for any of Freddie Mac's attorneys' fees, the affidavit in support of such fees submitted by Ms Sally Helppie, counsel for Freddie Mac, is too vague for the Court to base an award upon.

A. Effect of the Required Principal Reduction Clause

The Walkers argue that the Required Principal Reduction Provision limits their liability to $234,000 in principal. In order to interpret that provision, the Court must consider it in light of another provision, the "Other Amounts Provision," which immediately follows the Required Principal Reduction Provision in the Note.[2]

---

[2] The two provisions read as follows:

> [Required Principal Reduction Provision:] In any action commenced to enforce the obligation of the undersigned, and any partner, trustee, or beneficiary of the undersigned (herein the "Borrower") to pay principal and interest under the Note, the judgment shall be enforceable personally against the Borrower or the

The Walkers' argue that the phrase "such amounts" in the last sentence of the Required Principal Reduction Provision refers to all other amounts other than the Required Principal Reduction amount. (Resp. to Mot. for Partial Summ. J. at 3-4). Pursuant to that construction, the terms of the Note would limit collection of all amounts under the Note, other than the Required Principal Reduction amount, to income derived

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> Borrower's assets, in an amount equal to the initial ten percent (10%) of the original principal balance of the Note, (such amount shall be called the "Required Principal Reduction"). In other words, should a default occur in the note or the Deed of Trust, the Borrower shall be personally liable in the amount of the Required Principal Reduction. The amount of the Required Principal Reduction shall be reduced by payments made by the Borrower towards the principal amount of the Note. Any foreclosure proceeds, insurance proceeds or condemnation awards received by Note Holder and applied to the Note shall not reduce the Required Principal Reduction enforceable personally against the Borrower or the Borrower's assets, and the recourse of the Note Holder for the collection of <u>such amounts</u> shall be limited to actions against (1) the Property described in the Security Instrument executed by the Borrower to secure the Note; (2) the rents, profits, issues, products and income form the Property; and (3) any other collateral held by the Note Holder as security for the Note.
>
> [Other Amounts Provision:] Borrower shall be personally liable for the payment of all other amounts payable under the Note and for the performance of all other covenants in the Security Instrument.

(Aff. of Gregory S. Stuart Ex. A at 2) (emphasis added).

solely from collateral. Thus, under the Walkers' interpretation, their personal liability would be limited to the Required Principal Reduction amount.

Freddie Mac, on the other hand, opposes the Walkers' interpretation on the ground that the Required Principal Reduction Provision cannot so limit the Walkers' personal liability in light of the language in the Other Amounts Provision.

Applying established rules of contract interpretation, the Court must determine whether the above provisions of the Note are ambiguous or unambiguous. See R & P Enterprises v. LaGuarta, Gavrel & Kirk, Inc., 596 S.W. 2d 517,518 (Tex. 1980) ("The question of whether a contract is ambiguous is one of law for the court."). In so doing, the Court's primary concern is to enforce the intentions of the parties as expressed in the Note by construing the instrument so that no provisions are rendered meaningless. See id. at 518-19. A contract provision is ambiguous only if, after application of the rules of interpretation, it remains susceptible to more than one meaning. Id. at 519. A court, however, must not be too quick to declare a contract provision ambiguous; a court must first

attempt "to harmonize and thus give meaning to all apparently conflicting provisions of a contract when this reasonably may be done." See Southland Royalty Co. v. Pan Am. Petroleum Corp., 378 S.W. 2d 50, 57 (Tex. 1964).

In the case at bar, the Court finds that, while poorly drafted, the disputed provisions are not ambiguous. With respect to the Required Principal Reduction Provision, the Court finds (1) that the Walkers are personally liable for 10% of the original principal balance less any payments made by the Walkers towards the principal and (2) that the remaining principal and all interest payable under the Note are nonrecourse.

The Court further finds, however, the Required Principal Reduction Provision does not act as an absolute cap on personal liability. In other words, the Walkers are personally liable for all costs, expenses, and attorneys' fees expended on collection efforts. Contrary to the Walkers' argument, the phrase "such amounts" in the last sentence of the Required Principal Reduction Provision does not refer to all amounts owed other than the Required Principal Reduction amount. The Walkers' interpretation is impossible under the

rules of contract interpretation and under the rules of grammar.

1. The Required Principal Reduction Provision Acts as a Cap on Personal Liability for Principal and Interest.

Freddie Mac admits that the Note at issue in this case is partially nonrecourse. However, by virtue of the figures tendered by Freddie Mac, it apparently argues that only the remaining 90% of the original principal balance, not including any interest, is nonrecourse. However, from the language of the Required Principal Reduction Provision, the Court finds that both the remaining 90% of the original principal balance and all interest payable under the Note are nonrecourse.

Because the Note odes not specifically set out what amounts are nonrecourse, the Court is left with determining those amounts by inference from the language of the Required Principal Reduction Provision. That the Walkers are not personally liable for 90% of the original principal balance is an obvious inference. If the Court were to find otherwise (i.e., that the Walkers are nevertheless personally liable for the entire original princi-

pal balance), then the Required Principal Reduction Provision would be merely surplusage.

With respect to the interest payable under the Note, the inference that such amount is nonrecourse is drawn from the language of the first sentence of the Required Principal Reduction Provision. That sentence states that "[I]n any action commenced to enforce the obligation of the undersigned...to pay principal and interest under the Note, the judgment shall be enforceable personally...in an amount equal to the initial ten percent (10%) of the original principal balance of the Note." (Aff. of Gregory S. Stuart Ex. A at 2) (emphasis added). Therefore, by virtue of including the underlined portion of the above sentence, the Note limits personal liability for principal and interest to the Required Principal Reduction amount. if such limitation was not intended by the parties, they could have left out the underlined language or could have easily stated that the Required Principal Reduction Provision should not be taken to limit personal liability on interest payable under the Note.

Accordingly, the Court finds that, as a matter of law, the Walkers' personal liability for princi-

pal and interest is limited to the Required Principal Reduction amount.

2. The Required Principal Reduction Provision Does Not Cap Personal Liability for All Costs, Expenses and Attorneys' Fees Expended on Collection Efforts

Under the terms of the Note, the Walkers are liable for the costs of collection. Specifically, the Note provides that "[i]n the event of any default in the payment of this Note, and if the same is referred to an attorney at law for collection or any action at law or in equity is brought with respect hereto, the undersigned shall pay the holder hereof all expenses and costs, including, but not limited to, attorney's fees." (Aff. of Gregory S. Stuart at 1).

The Walkers contend, however, that the last sentence of the Required Principal Reduction Provision serves to limit recourse for any such expenses to amounts derived from collateral. The Walkers argue that this is so because the phrase "such amounts" in the last sentence of the Required Principal Reduction Provision refers to all amounts other than the Required Principal Reduction amount. The Court is not persuaded.

First, to give the phrase "such amounts" the meaning attributed to it by the Walkers would be

to render the Other Amounts Provision meaningless. As set out above, the Other Amounts Provision, which directly follows the Required Principal Reduction Provision, provides that the Walkers are personally liable for "all other amounts payable under the Note." (Aff. of Gregory S. Stuart at 1). If the sentence containing the "such amounts" phrase is construed as placing a cap on the Walkers' personal liability, the Other Amounts Provision would be a nullity.

Furthermore, under the rules of grammar, the phrase "such amounts" could not have the meaning ascribed to it by the Walkers. In order to determine the meaning of the phrase, the Court must determine the meaning of the pronoun "such." Under general principals of grammar, one determines to what a pronoun refers by identifying its antecedent. See generally John C. Hodges et al., Harbrace College Handbook 278-83 (10th ed. 1986). The Walkers contend that the pronoun "such" refers to all amounts owed other than the Required Principal Reduction amount, yet there is no specific word or phrase to that effect in the Note to which the pronoun "such" could refer. And, as

a rule, reference to a word or idea not expressed, but merely implied, is prohibited. id. at 281.

Furthermore, upon close reading of the sentence containing the "such amounts" phrase, the only thing that could possibly the antecedent is the phrase "foreclosure proceeds, insurance proceeds or condemnation awards" (the "list of amounts phrase) (Aff. of Gregory S. Stuart at 1). Given that the "list of amounts" phrase (1) precedes and is therefore in close proximity to the ":such amounts" phrase and (2) is the only specific group of words to which the pronoun "such" could possibly refer, the Court finds that the phrase "such amounts" refers to foreclosure proceeds, insurance proceeds or condemnation awards. The Court's construction of the "such amounts" phrase, more so than that proposed by the Walkers, comports with the context of the sentence containing the phrase (i.e., foreclosure proceeds, insurance proceeds and condemnation awards are all amounts derived from the collateral).[3]

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[3] Whether the Required Principal Reduction Provision, and specifically the last sentence of that provision, make any sense as a general proposition is another matter. Upon research of cases involving promissory notes with similar pro-

vision, the Court came upon a very similar provision in Federal Home Loan Mortgage Corp. v. White Plains Assoc., 1993 WL 319429 at 5 (S.D.N.Y. 1993). That provision provided as follows:

> In any action commenced to enforce the obligation of the undersigned, and any partner, trustee or beneficiary of the undersigned (herein the "Borrower") to pay principal and interest under the Note, the judgment shall not be enforceable personally against the Borrower or the Borrower's assets, and the recourse of the Note Holder for the collection of such amounts shall be limited to actions against (1) the Property described in the Security Instrument executed by the Borrower to secure the Note; (2) the rents, profits, issues, products and income from the Property; and (3) any other collateral held by the Note Holder as security for the Note.

Id. at *5.

In the White Plains case, the provision above was obviously intended to relieve the debtors of any personal liability for principal and interest. And, the pronoun "such" in the "such amounts" phrase in the last sentence of that provision clearly refers to principal and interest. Accordingly, the last sentence serves to confirm that, should the debtor default, the lender would be limited to collecting the outstanding principal and interest only from proceeds derived from the collateral.

The Court suspects that the above provision was the boilerplate model that the drafters of the Note at issue in this case used as a form for the Required Principal Reduction Provision. However, for the reasons pointed out in the text, the drafters of the Required Principal Reduction Provision altered the provision in such a way as to make interpretation difficult.

Furthermore, the above interpretation, unlike the interpretation proposed by the Walkers, gives effect to the Other Amounts Provision. The Other Amounts provision states that the Walkers are personally liable for all other amounts owed under the Note. In light of the above, "all other amounts" must mean all other amounts owed under the Note less the remainder of any outstanding principal balance.

Therefore, for the reasons stated above, the Court finds that, as a matter of law, the Walkers' are personally liable for all costs, expenses and attorneys' fees expended on efforts to collect under the Note.

B. Application of the Proceeds of the Foreclosure Sale

The Walkers next argue that, under Paragraph 27 of the Deed of Trust, the $1,440,000 in foreclosure proceeds must be applied against and thereby reduce any liability on their part for outstanding costs. Paragraph 27 of the Deed of Trust states that the "Trustee shall apply the proceeds of the [foreclosure] sale [first] . . . . to all reasonable

costs and expenses of the sale, including, but not limited to, reasonable Trustee's fees and attorneys' fees and costs of the title evidence . . . .[and then] to all sums secured by [the Security] Instrument in such order as Lender, in Lender's sole discretion, directs." (Aff. of Gregory S. Stuart at 2).

Freddie Mac, on the other hand, argues that, pursuant to the Other Amounts Provision of the Note, the Walkers are personally liable for all such costs and that the Walkers are not entitle to a reduction of their liability via an offset against the proceeds collected in the foreclosure sale. Freddie Mac contends that Paragraph 27 of the Deed of Trust is not meant to relieve the Walkers of personal liability for outstanding costs, but rather only sets out the order in which the Trustee should apply the foreclosure proceeds.

Again, the Court must determine the effect of two contract provisions, Paragraph 27 of the Deed of trust and the Other Amounts Provision of the Note. Following the rule requiring the Court to attempt to reconcile arguably repugnant provisions, the Court finds that there is no fact question as to the Walkers are entitled to an offset of the foreclosure proceeds first against all costs and

fees of the foreclosure sale and than against the outstanding principal balance (not including the required principal reduction amount).[4]

The Court is unpersuaded by Freddie Mac's argument that Paragraph 27 of the Deed of Trust was not intended to allow an offset. While Paragraph 27 certainly serves to set our the order of application of the foreclosure proceeds, the importance of having an order of application is to determine in what order the proceeds will be used to satisfy the Walkers' outstanding liabilities. It makes no sense to say the Deed of Trust provides for an order of application of proceeds just of the sake of having such an order. The obvious intent of Paragraph 27 is to require application of the proceeds first to all costs of the foreclosure, then to the outstanding debt secured by the Deed, and fi-

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[4] Under the Deed of Trust, after application of the foreclosure proceeds to the costs and expenses of the foreclosure sale, the remaining proceeds are to be applied at the Lender's discretion. The Court, assuming Freddie Mac would opt to collect as much as possible, has assumed that Freddie Mac will choose to apply the remaining proceeds to the remaining outstanding principal balance (not including the required principal reduction amount).

nally to the debtor if any excess exists. See (Aff. of Gregory S. Stuart Ex. B. at ¶ 27).

Furthermore, the Other Amounts Provision can be reconciled with this interpretation. That provision is located in two places: at the end of the Note and at the end of the Deed of Trust. By placing the Other Amounts Provision at the end of the Deed of Trust, it must be read in conjunction with Paragraph 27, which precedes the Other Amounts Provision. Therefore, the phrase "all other amounts" in the Deed of Trust must be taken to mean all other amounts owing under the Note after application of the foreclosure proceeds.

Moreover, that the parties understood that the "other amounts" for which the Walker are personally liable would be subject to offset is also apparent from the language in the Note. In the Required Principal Reduction Provision of the Note, the drafters made a specific point of stating that "[a]ny foreclosure proceeds . . . received by Note Holder and applied to the Note shall not reduce the Required Principal Reduction enforceable personally against the Borrower." (Aff. of Gregory S. Stuart Ex. A at 2). Had it not been understood by the parties that the Walkers are entitled to a set-off of

their personal liabilities against any available foreclosure proceeds, the above caveat in the Required Principal Reduction Provision would be mere surplusage. Therefore, reading both the Deed of Trust and the Note in conjunction with one another, it its apparent that the parties intended that if sufficient foreclosure proceeds were recovered, they would be set-off against amounts for which the Walkers are personally liable, with the exception of the Required Principal Reduction.

Finally, federal case law supports the court's interpretation. In two federal cases that involved mortgages in which the borrowers were personally liable for some amounts under the notes, both courts held that such amounts should be set-off by any applicable foreclosure proceeds. See White Plains, 1993 WL 319429 at *6; Federal Home Loan Mortgage Corp. v. Perez, 1992 WL 350595 at *4. Moreover, in the White Plains case, the court interpreted a provision identical to the Other Amounts Provision in the present lawsuit and nevertheless found that the "other amounts" for which the borrower was personally liable were subject to offset. 1993 WL 319429 at 5-6.

C. Sufficiency of Affidavit Supporting Attorneys' Fees

As noted above, the Court finds that the Walkers are personally liable for all attorneys' fees generated by Freddie Mac's collection efforts. The Walkers dispute the amount of those fees arguing that Freddie Mac's affidavit supporting its request for attorneys' fees is insufficient to support an award of fees by the Court. Under the standard followed by the Fifth Circuit, the Court agrees. See Copper Liquor, Inc. v. Adolph Coors Co., 684 F.2d 1087 (5th Cir. 1982), overruled in part on other grounds by International Woodworkers of Am. v. Champion Int'l Corp., 790 F.2d 1174 (5th Cir. 1986), and overruled in part on other grounds by J.T. Gibson, Inc. v. Crawford Fitting Co., 790 F.2d 1193 (5th Cir. 1986). Accordingly, the Court orders Freddie Mac to provide additional support for its attorneys' fee request as set out below.

CONCLUSION

Therefore, having considered the argument, authority, and record in this action, the Court finds that Freddie Mac's Motion for Summary Judgment on Promissory Note should be and is, hereby, GRANTED to the extent that Freddie Mac

is entitled to recover an amount consistent with the findings and orders of the Court.

The Court Summarizes its findings and orders as follows:

1. As a matter of law, the Walkers breached the Note between themselves and Freddie Mac.

2. The Required Principal Reduction Provision caps the Walkers' personal liability for principal and interest owed under the Note. Accordingly, the Walkers' personal liability for principal and interest is limited to the Required Principal Reduction amount (i.e., 10% of the original principal balance less any payments previcusly made towards the principal).

3. The Required Principal Reduction Provision does not cap personal liability for all costs, expenses, and attorneys' fees expended on collection efforts. Therefore, pursuant to the Other Amounts Provision, the Walkers are personally liable for all costs, expenses, and attorneys' fees associated with collection under the Note.

4. The Walkers are entitled to an offset of the foreclosure proceeds ($1,440,000.00) first against all

costs, expenses, and attorneys' fees of the foreclosure sale and then against the remaining outstanding principal balance (not including the Required Principal Reduction amount).

5. Freddie Mac is entitled to recover attorneys' fees expended on collection efforts less those fees attributable to foreclosure, as those are to be set-off against the foreclosure proceeds (see finding No. 4). Freddie Mac's briefing on attorneys' fees, however, is deficient under the standards set out by the Fifth Circuit in Copper Liquor, 684 F.2d 1087. Freddie Mac and the Walkers are therefore ORDERED to attempt in good faith to reach an agreement on reasonable attorneys' fees by April 30, 1996. Should the parties fail to reach an agreement, the Court ORDERS that (1) Freddie Mac must submit to the Court by May 31, 1996, a more detailed, well-organized assessment of its attorneys' fees, including billing statements and (2) the Walkers must submit any response to Freddie Mac's assessment by June 20, 1996.

6. Freddie Mac is entitled, pursuant to the Required Principal Reduction Provision, to 10% of the

original principal balance less any amount previously paid by the Walkers towards the principal; the Walkers are personally liable for this amount and have to right to set-off this amount against any foreclosure proceeds.

7. Freddie Mac is entitled to (1) all costs, expenses, and attorneys' fees expended on collection efforts less the expenses attributable to foreclosure, as those expenses are to be set-off against the foreclosure proceeds (see finding) No. 4), (2) to post-foreclosure interest at a daily rate of $267.75 from March 3, 1993 until paid, and (3) to pre- and post-judgment interest as allowed by law.

8. Finally, within 10 days after resolution of the attorneys' fee dispute, the parties are hereby ORDERED to prepare and submit an Agreed Judgment in accordance with the findings and orders set out in this Memorandum Opinion and Order.

SO ORDERED this 29th day of March 1996.

JORGE A. SOLIS
UNITED STATES DISTRICT JUDGE

FILED
AUG 20 1998
OFFICE OF THE CLERK

No. 98-121

In The

Supreme Court of the United States

October Term, 1997

JOHN J. WALKER, MADELINE E. WALKER,
DAVID M. WALKER and RICHARD J. WALKER,

Petitioners,

vs.

FEDERAL HOME LOAN MORTGAGE CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW (RESTATED)

Whether the lower courts correctly determined that Petitioners failed, as a matter of law, to prove at least one essential element of their fraud-based counterclaims against Respondent.

STATEMENT PURSUANT TO RULE 29.6

Respondent has no parent company and has three nonwholly owned subsidiaries: Home Ownership Funding Corporation; Home Ownership Funding Corporation II; and West*Mac Associates Limited Partnership.

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APPENDIX

Appendix A — Relevant Statute Involved 1a

STATEMENT OF THE CASE

A. Procedural Background

Respondent Federal Home Loan Mortgage Corporation ("Freddie Mac") is a government-sponsored, corporate entity created by an Act of Congress under 12 U.S.C.A. § 1451 *et seq.* (1989 and Supp. 1998). Freddie Mac functions as a financial intermediary between mortgage originators and the general capital markets, improving the availability of residential mortgage loans and thereby fostering increased mortgage credit for home buyers across the country. Freddie Mac also owns and sells residential real estate obtained by it through foreclosure or deeds-in-lieu of foreclosure. (Petitioners' Appendix ("Pet. App.") B-10; R. Dkt. 224, p. 7).[1] Petitioners (the "Walkers") are experienced and sophisticated real estate investors. (Pet. App. B-27; R. Dkt. 123, p. 1; 124; 125, p. 1). After Freddie Mac sued to collect on a promissory note, the Walkers asserted counterclaims for intentional infliction of emotional distress, fraud, negligent misrepresentation, and deceptive trade practices. The trial court granted Freddie Mac's motions for summary judgment and the United States Court of Appeals for the Fifth Circuit affirmed *per curiam* without an opinion. (Pet. App. A-1). The Walkers' Petition for Rehearing was denied. (Pet. App. A-2, 3).

B. Factual Background

On June 6, 1989, Freddie Mac acquired the Northhaven Racquet Club Apartments ("Northhaven") through a foreclosure

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1. The Record in the District Court was not numbered for appeal purposes. Accordingly, citations in this brief to the original papers filed in the District Court are cited as "R." followed by the lower court's docket number ("Dkt.") and, where applicable, by page reference within the cited document.

sale. Freddie Mac almost immediately listed the 344-unit complex for sale with a real estate broker at an asking price of $2.7 million cash. (Pet. App. B-12; R. Dkt. 224, p. 9). Approximately two weeks later, David Walker submitted a written letter announcing the Walkers' intent to "bid aggressively" for Northhaven and setting forth some of the grounds for their interest in Northhaven. (Pet. App. B-12; R. Dkt. 112, Ex. 1). Over the next several months, the Walkers made no less than three written offers to purchase Northhaven, all of which offers were rejected by Freddie Mac primarily because Freddie Mac hoped to sell Northhaven for cash and the Walkers wanted seller financing. (Pet. App. B-12; R. Dkt. 112, Exs. 2, 3, 4). Importantly, these multiple offers to purchase Northhaven were made long before any alleged misrepresentations by Freddie Mac.

Thereafter, in November 1989, a Bid Package was prepared for potential purchasers of Northhaven by auctioneer JBS & Associates. The bid package contained numerous warnings, disclaimers and disclosures regarding Northhaven, including:

> The properties are being sold on an "AS-IS, WHERE-IS, WITH ALL FAULTS" basis.
>
> THE INFORMATION CONTAINED IN THIS BROCHURE IS SUBJECT TO INSPECTION BY ALL APPROPRIATE PARTIES. ALL INFORMATION REGARDING THE PROPERTIES HAS BEEN OBTAINED BY SELLER FROM THIRD PARTIES. NO LIABILITY FOR ITS ACCURACY, ERRORS, OR OMISSIONS IS ASSUMED BY THE SELLER OR ITS AGENT.

* * *

> *Disclosure*: It should be noted by the prospective purchaser that the property was acquired by the Seller through a foreclosure process or by a deed-in-lieu of foreclosure. Therefore, the availability of historical Income and Expense information and explanations of variances in the given figures may be limited. In order to aid a prospective purchaser in his analysis of the property for sale, the Seller has made available the Income and Expense information of the property to the extent that the information was available to the Seller. The Seller makes the information available solely for the purpose of disclosing that the Seller has such information, but makes no representations, warranties, or other assertions, express or implied, with respect to the accuracy or content of such information.
>
> * * *
>
> All information contained herein is obtained from sources deemed reliable, but neither the Seller nor JBS & Associates make any representations, warranties, or assertions, express or implied, with respect to the accuracy or content of such information.

(Pet. App. B-12-14; R. Dkt. 112, Ex. 5).

The Walkers unsuccessfully attempted to obtain third party financing in order to bid at the auction of Northhaven on December 12, 1989. (R. Dkt. 112, Ex. 20, pp. 126-27, 57). When there were no bidders, the auction did not proceed. (Pet. App. B-14; R. Dkt. 112, Ex. 24, p. 17). Thereafter, the Walkers made yet another written offer to purchase Northhaven, this time for the sum of $2.6 million, with financing in the amount

of $2,340,000 from Freddie Mac, a 12-month no-payment period, and a guaranty by John and Madeleine Walker to infuse a minimum of $200,000 into rehabilitating Northhaven. (Pet. App. B-14; R. Dkt. 112, Exs. 5, 7). In presenting his parents' offer, David Walker emphasized that "it is imperative that we close [the sale] before mid-January, 1990 as the tax benefits expire. The tax benefits allow us to make this offer 44% above the earlier listed cash price." (R. Dkt. 112, Ex. 6). Moreover, the offer letter sent to Freddie Mac and signed by David Walker included the following:

> *Disclaimer*: Except for any warranties contained in the Deed, Purchaser acknowledges that Seller disclaims any warranty or representation concerning the nature and condition of the Property or any lease, lien, encumbrance, reservation, or condition with respect thereto or the compliance of the Property or its operation with applicable laws, ordinances, and regulations. PURCHASER SHALL ACCEPT THE PROPERTY "AS-IS", WITHOUT WARRANTY OR REPRESENTATION OF SELLER, EXPRESS OR IMPLIED, OR ARISING BY OPERATION OF LAW INCLUDING, BUT NOT LIMITED TO, ANY WARRANTY OF CONDITION, HABITABILITY, MERCHANTABILITY, OR FITNESS FOR A PARTICULAR PURPOSE OF THE PROPERTY.

(Pet. App. B-15; R. Dkt. 112, Ex. 7). The Offer Letter from the Walkers also stated:

> Purchaser further acknowledges and agrees: . . . (e) any information provided and/or to be provided by Freddie Mac and/or their respective agents and employees (as applicable) with respect to the Property was (or will be) obtained from a variety of sources, and Seller, and their respective agents and employees

> (as applicable) make no representations or warranties whatsoever as to the accuracy or completeness of such information because (i) such information is expressly not guaranteed and (ii) Purchaser has not relied and will not rely on such information in its consideration of the Property but will rely exclusively on its own investigation to determine whether to purchase the Property.

Id.

On January 17, 1990, Freddie Mac sold Northhaven to Richard Curtin, who immediately sold it to John and Madeleine Walker as part of a tax vehicle. (Pet. App. B-16; R. Dkt. 112, Ex. 9, 10). The Multi-Family Property Sales Agreement between Freddie Mac and Richard Curtin, which also contained an addendum acknowledging that John and Madeleine Walker were the actual purchasers, contained the following language:

> *No Representations.* Except as expressly set forth herein or called for in any of the instruments attached as exhibits hereto, SELLER MAKES NO WARRANTIES OR REPRESENTATIONS of any kind or character, express or implied with respect to the Property or the Personal Property, their physical condition (including but not limited to the presence of any Hazardous Material on or in the Property or Personal Property), the income to be derived therefrom, the expenses to be incurred with respect thereto, or any other matter relating to or affecting the same, and there are no oral agreements, warranties, or representations collateral to or affecting the Property or the Personal Property except as may be expressly set forth herein.

(Pet. App. B-16; R. Dkt. 112, Exs. 12, 13).

John and Madeleine Walker defaulted on payments for Northhaven beginning in July 1992. (*See* R. Dkt. 210, p. 2). By November 1992, with the Dallas Water Utilities threatening to shut down all water service to Northhaven for lack of payment, Freddie Mac initiated the lawsuit which forms the basis for the present appeal. (Pet. App. B-8; R. Dkt. 1, Ex. 1).

ARGUMENT AND AUTHORITIES: REASONS FOR DENYING THE WRIT

I.

THE COURT SHOULD NOT GRANT A WRIT OF CERTIORARI BECAUSE THERE IS NO CONFLICT BETWEEN THE FIFTH CIRCUIT COURT OF APPEALS AND A DECISION OF ANOTHER UNITED STATES COURT OF APPEALS ON AN IMPORTANT MATTER.

Petitioners argue that the Fifth Circuit, by its *per curiam* decision without opinion, somehow established new federal law. Petitioners cite a 1966 case, *Jackson v. Sam Finley, Inc.*, 366 F.2d 148 (5th Cir. 1966), to support their contention that the Fifth Circuit has decreed that a buyer cannot prevail, as a matter of law and under any circumstances, on a fraud claim where the buyer signs a contractual disclaimer of its reliance. *See* Petition, pp. 13-14. Petitioners claim that these two decisions by the Fifth Circuit are in conflict with two decisions rendered by the Eighth Circuit Court of Appeals. Petitioners are incorrect. The Fifth Circuit in both this case and in *Jackson v. Sam Finley* affirmed lower court decisions that considered a variety of relevant facts. Contrary to Petitioners' suggestion, neither established new federal common law. Indeed, both applied state substantive law. Moreover, neither this case nor *Jackson v. Sam Finley* conflicts with the Eighth Circuit decisions.

In *Jackson v. Sam Finley*, the court applied Mississippi substantive law to the fraud-based claims asserted. In applying that law, the court acknowledged the various facts considered by the trial court, including the existence of disclaimers in the contractual documents. The court then determined that, under all the circumstances, the lower court's finding that there was no fraud was supported by the evidence. Likewise, the trial court in this matter considered all of the summary judgment evidence before it, which included affidavits and deposition excerpts. The trial court reviewed all the evidence and correctly concluded that the Walkers were sophisticated investors and were on sufficient notice that Freddie Mac did not warrant the accuracy of any financial representations. (*See* Pet. App. B-27). The court additionally emphasized the numerous disclaimers made by Freddie Mac. The court further noted that the Walkers failed to establish a link between the alleged misrepresentations of Freddie Mac and any damages they may have suffered. (*See* Pet. App. B-32-33). In sum, the lower court carefully examined all of the summary judgment evidence and did not rely solely on a single disclaimer by Freddie Mac. No new "federal law standard" (Petition, p. 13) was established.

In the same way, the purportedly conflicting decisions from the Eighth Circuit do not conflict at all. In both *Commercial Property Investments, Inc. v. Quality Inns International, Inc.*, 938 F.2d 870 (8th Cir. 1991) and *Clements Auto Co. v. Service Bureau Corp.*, 444 F.2d 169 (8th Cir. 1971), the courts conducted the same analysis that the lower court did in this case. In all matters, the courts considered all of the factual evidence presented.

There simply is no conflict between the Fifth and Eighth Circuits. Both apply state law to state law claims. Both evaluate the evidence in determining questions of intent and reliance. Neither has developed a hard-and-fast rule eliminating fraud claims when disclaimers exist.

II.

THE COURT SHOULD NOT GRANT A WRIT OF CERTIORARI BECAUSE THE FIFTH CIRCUIT COURT OF APPEALS CORRECTLY AFFIRMED THE TRIAL COURT'S DETERMINATION THAT PETITIONERS COULD NOT PROVE AT LEAST ONE OF THE ELEMENTS OF EACH OF THEIR FRAUD-BASED COUNTERCLAIMS.

The Petition, by its terms, seeks review only as to the Walkers' common law fraud counterclaim. The lower court correctly found and the Fifth Circuit correctly affirmed that, as a matter of law, the Walkers could not establish one or more of the necessary elements for their fraud-based claims. The elements of common law fraud are: (1) a false representation; (2) about a material fact; (3) made with knowledge of its falsity; (4) with the intent to deceive the other party; (5) and the other party actually relies on the false representation; (6) to its injury. *Pence v. United States*, 316 U.S. 332, 338 (1942); *DeSantis v. Wackenhut*, 793 S.W. 2d 670, 688 (Tex. 1990), *cert. denied*, 498 U.S. 1048 (1991). Petitioners also asserted a statutory cause of action for fraud in a real estate transaction, although that claim is not specifically mentioned in the Petition. The elements of fraud in a real estate transaction are: (1) a false representation; (2) made to a person for the purpose of inducing that person to enter into a contract; (3) which is relied on by that person; (4) in entering into that contract. Tex. Bus. & Com. Code § 27.01(a) (West 1998). Importantly, the statute is inapplicable when there is no contract for the sale of land or stock between the parties. *See Greenway Bank & Trust of Houston v. Smith*, 679 S.W. 2d 592, 596-97 (Tex. App. — Houston [1st Dist.] 1984, *writ ref'd n.r.e.*); *Texas Commerce Bank Reagan v. Lebco Constructors, Inc.*, 865 S.W. 2d 68, 82 (Tex. App. — Corpus Christi 1993, *writ denied*). It was

undisputed in the lower court that neither Richard nor David Walker executed a contract with Freddie Mac. (Pet. App. B-28). Consequently, their statutory fraud counterclaim was barred.

The lower court correctly held that the Walkers could not establish any intent to deceive on the part of Freddie Mac. The Bid Package, which the Walkers claim was an attempt to mislead them, included numerous disclaimers as to its accuracy. (R. Dkt. 112, Ex. 5). The repeated notices that potential purchasers (including the Walkers) could not and should not rely on the information contained therein, plainly demonstrate no intent to deceive or induce reliance. Significantly, the Bid Package did not even exist until *after* the Walkers had made several written offers to purchase Northhaven.

Moreover, in their own offer letter to purchase Northhaven, the Walkers repeatedly confirmed that the purchase of Northhaven was without warranties, guarantees, or representations of any kind from Freddie Mac. (R. Dkt. 112, Ex. 7). Indeed, John and Madeline Walker expressly denied that any representations ever were made to them by anyone connected with Freddie Mac. (*See* R. Dkt. 112, Ex. 21, p. 53). In addition, the individuals whom Richard and David Walker have claimed at various times made misrepresentations all expressly denied an intent to mislead. (R. Dkt. 112, Ex. 17, p. 92; Ex. 18, p. 77; Ex. 19, p. 148).

Just as the Walkers could not demonstrate an intent to mislead, they could not show reliance (much less justifiable reliance). In the offer that ultimately was accepted by Freddie Mac, the Walkers specifically represented that they were *not* relying on any information received from Freddie Mac at any time. (R. Dkt. 112, Ex. 7). Indeed, John and Madeline Walker demanded (and received) an inspection period, including the

right to inspect books and records, specifically for the purpose of conducting their own due diligence. (R. Dkt. 112, Ex. 7). Furthermore, the contract of sale repeated that John and Madeline Walker were acquiring Northhaven without any warranties or representations. (R. Dkt. 112, Ex. 12). Consequently, the Walkers were not entitled to rely, and specifically represented that they would not rely, on Freddie Mac.

The case of *Prudential Insurance Co. of America v. Jefferson Associates*, 896 S.W. 2d 156 (Tex. 1995), is squarely on point. There, the purchaser of a four-story office building sued Prudential for, among other things, fraud and violations of the Texas Deceptive Trade Practices — Consumer Protection Act related to the sale. *Id.* at 160. The buyer contracted for, and received, a right to inspect the building. The sales contract between the buyer and Prudential stated that the buyer was not "relying upon any representation, statement or other assertion with respect to the Property" and was instead relying upon his own "examination of the Property." *Id.* The Texas Supreme Court reviewed the facts and dismissed the buyer's claims, noting that the buyer in essence had agreed that "Prudential did not harm him and could not have done so, since he was relying entirely upon his own examination of the property." *Id.* at 164. As in this case, a buyer who obtains inspection rights and represents to a seller that he will conduct his own inspection and not rely on the seller cannot later claim he did so rely. "The sole cause of a buyer's injury in such circumstances, by his own admission, is the buyer himself." *Id.* at 161. *See also Grumman Allied Industries v. Rohr Industries, Inc.*, 748 F.2d 729 (2nd Cir. 1984) (a sophisticated party who inspects property and specifically disclaims reliance upon a representation in a contract cannot subsequently assert it was fraudulently induced to enter into the contract by the very representation disclaimed).

The record before the trial court also conclusively established that the Walkers could not have justifiably relied on the alleged fraudulent representations.

> To determine justifiability, courts inquire whether — given a fraud plaintiff's individual characteristics, abilities, and appreciation of facts and circumstances at or before the time of the alleged fraud — it is extremely unlikely that there is actual reliance on the Plaintiff's part.

Haralson v. E.F. Hutton Group, Inc., 919 F. 2d 1014, 1026 (5th Cir. 1990) (citations omitted).

As the trial court recognized, the Walkers were sophisticated investors. (Pet. App. B-28). Prior to the Northhaven transaction, the Walkers had been involved in numerous commercial real estate transactions in Texas. (R. Dkt. 124, 125). The Walkers inspected and monitored the Northhaven property for months before making the offer which was ultimately accepted by Freddie Mac. (*See* R. Dkt. 112, Exs. 1, 2, 3, 4). Moreover, the Walkers obtained a 10-day inspection period in the sales contract to perform their due diligence and specifically disclaimed reliance on any representation or information supplied by Freddie Mac. (R. Dkt. 112, Exs. 12, 13). Prior to the expiration of the inspection period, the Walkers had the right to terminate the contract without any penalty. (*Id.*). Therefore, any claim for justifiable reliance must be rejected in view of the undisputed evidence that the Walkers enjoyed unfettered access to Northhaven and its books and records, possessed the business expertise to make effective use of such access, and asserted that they were relying solely on such access in making their decision to purchase Northhaven. *See Grumman Allied Industries*, 748 F. 2d at 737. Thus, the trial court correctly ruled, and the Fifth Circuit Court of Appeals correctly affirmed, that Freddie Mac

was entitled to an award of summary judgment on the Walkers' common law fraud counterclaim because the Walkers could not prove, as a matter of law, at least one of the essential elements of their claim.

CONCLUSION

For the foregoing reasons, Respondent prays that Petitioners' request for a writ of certiorari be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A — RELEVANT STATUTE INVOLVED

CHAPTER 27. FRAUD

Section

27.01. Fraud in Real Estate and Stock Transactions.
27.02. Certain Insurance Claims for Excessive Charges.

§ 27.01. Fraud in Real Estate and Stock Transactions

(a) Fraud in a transaction involving real estate or stock in a corporation or joint stock company consists of a

(1) false representation of a past or existing material fact, when the false representation is

(A) made to a person for the purpose of inducing that person to enter into a contract; and

(B) relied on by that person in entering into that contract; or

(2) false promise to do an act, when the false promise is

(A) material;

(B) made with the intention of not fulfilling it;

(C) made to a person for the purpose of inducing that person to enter into a contract; and

(D) relied on by that person in entering into that contract.

Appendix A

(b) A person who makes a false representation or false promise commits the fraud described in Subsection (a) of this section and is liable to the person defrauded for actual damages.

(c) A person who makes a false representation or false promise with actual awareness of the falsity thereof commits the fraud described in Subsection (a) of this section and is liable to the person defrauded for exemplary damages. Actual awareness may be inferred where objective manifestations indicate that a person acted with actual awareness.

(d) A person who (1) has actual awareness of the falsity of a representation or promise made by another person and (2) fails to disclose the falsity of the representation or promise to the person defrauded, and (3) benefits from the false representation or promise commits the fraud described in Subsection (a) of this section and is liable to the person defrauded for exemplary damages. Actual awareness may be inferred where objective manifestations indicate that a person acted with actual awareness.

(e) Any person who violates the provisions of this section shall be liable to the person defrauded for reasonable and necessary attorney's fees, expert witness fees, costs for copies of depositions, and costs of court.

* * *